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No. 08-399

Supreme Court, U.S.
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In The Supreme Court of the United States

LADERRICK CAMPBELL
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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BRIEF IN REPLY

This case raises the persistent and pervasive question of the proper bounds of juror excludability under *Witherspoon* and *Witt*. It also raises the inseparable question of whether the instrument for determining such excludability—the "prevent or substantially impair" test—needs fine-tuning or complete retrenchment to the certainty provided at the adoption of the Sixth Amendment.

The State does not dispute that the process of death-qualification should comport with the historical understanding of the Sixth Amendment. Nor does the State dispel confusion over what it means for a juror to be "substantially impaired." Instead, it asks this Court to apply the rule for cases on federal *habeas* review to cases on direct review. As Chief Justice Calogero's dissent emphasized, deference to the trial court, though admittedly broad, cannot substitute for the "level playing field for the accused and the state in jury selection in capital cases" that is necessarily absent where, as here, *Witherspoon* and *Witt* are not applied "evenhandedly." Pet. App. C at 163a-164a.

I. The State's Opposition Brief Underscores Why The *Witt* Test Must Be Clarified And Tightened So That Courts Consistently Ensure that Capital Juries Are Fair and Impartial.

The opposition brief demonstrates how *Witt* was applied in an inconsistent manner in this case

and why this Court should clarify the substantial impairment test to ensure its equal application.

The State paints Juror Lee as someone who would only consider a death sentence in the "most extreme" circumstances. Cert. Opp. at 9. It acknowledges that Juror Lee volunteered she could impose the death penalty for "bad serious" crimes, crimes involving torture, or in scenarios where the killer had no conscience about killing. *Id.* at 8. These examples, far from being the "most extreme," apply to many—if not most—of the cases where the death penalty is an option.

These very same "overkill" factors were the basis of the State's defense of Juror Payne's eligibility to serve: "Mr. Payne stated that he would impose the death penalty if the murder was brutal, or a case of 'overkill' . . . ." Cert. Opp. at 11. As Chief Justice Calogero explained in dissent, Juror Payne would impose the death sentence for *every* brutal murder, and, to him, every murder was brutal:

> He also indicated that if the killing were "brutal," he would have "no reservations" in imposing the death penalty, stating that "it's very hard to be reasonable when it's a brutal situation." Id., pp. 41 and 42. Payne then referred with approval to the statement of another prospective juror, Leland McNabb, who was eventually removed for cause, who had described as brutal every murder case he had seen in his 25 years as a paramedic.

State v. Campbell, Pet. App. C at 161a-162a. Juror Payne further stated that his determination of whether a death sentence was appropriate depended on the "brutality, the savagery, the unnecessity of the killing." Pet. App. A at 115a. Whatever the semantic distance between "no conscious [sic] about killing nobody" and "unnecessity of the killing," one cannot serve as the basis for *Witherspoon-Witt* exclusion while the other justifies the seating of a different juror.

Moreover, the State's reliance on *Uttecht v. Brown*, 127 S. Ct. 2218 (2007), is a reason to grant—not deny—review in this case. The defendant in *Uttecht*, a federal *habeas* case subject to the stringent AEDPA limitations, sought to reverse his conviction based upon alleged *voir dire* errors to which defense counsel did not even object.[1] This Court chose to uphold the conviction and death sentence because it did not find the Washington Supreme Court's analysis an "unreasonable application of clearly established federal law." *Uttecht*, 127 S. Ct. at 2230; *cf. id.* ("[N]either must we treat the defense's acquiescence in Juror Z's removal as inconsequential."). Petitioner's

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[1] Further illustrating the difference between the *voir dire* conducted in *Uttecht* and the one here: The trial judge that presided over *voir dire* in *Uttecht* "gave careful and measured explanations for its [cause] decisions." 127 S. Ct. at 2225. The trial judge presiding over petitioner's case provided no such explanation. *State v. Campbell* (Calogero, C.J., dissenting) ("The trial judge denied the challenge without reasons."), Pet. App. C at 163a.

case comes to the Court on direct review, and concerns errors properly raised by defense counsel.

A. The State's Opposition Brief Expands The "Substantial Impairment Test" To Jurors With Mere Personal Aversion To Capital Punishment Even Where The Juror Indicates That She Can Set Aside Her Beliefs And Consider A Death Sentence.

Juror Lee's personal aversion towards capital punishment should be irrelevant to the *Witt* analysis; what matters is that Juror Lee unambiguously stated that she could set aside her beliefs and consider a death sentence. The State cites *Uttecht v. Brown* for the proposition that a juror must not be "substantially impaired in his or her ability to impose the death penalty under the governing legal framework," which is to say that the juror must operate within "the legal framework state law prescribes." *Id.* at 2224. Juror Lee operated within this framework.

The Louisiana framework "[does] not provide any presumptions or fixed standards for a capital sentencing jury to use in considering aggravating and mitigating circumstances." *State v. Campbell*, Pet. App. C at 157a; *see also State v. Higgins*, 898 So. 2d 1219 (La. 2005) ("Louisiana law does not provide any standard for a juror to weigh mitigating circumstances against aggravating circumstances, but rather simply requires the finding of an enumerated aggravating circumstance by the jury to impose the death penalty

and also requires that each juror consider any mitigating circumstances presented, if any, by the defense before deciding to recommend a sentence of death.").

Thus, once aggravating factors have been found, the Louisiana scheme gives unlimited discretion to the jurors to decide if death is the appropriate punishment. Under such a scheme, "all [a juror] must do to follow instructions is consider the death penalty, even if in the end he or she would not be able to impose it." *Uttecht*, 127 S. Ct. at 2222-23.

Juror Lee stated that she would consider the death penalty: "Yes, I could sit on a death penalty [case] and consider it and think about it and pray about it and come up with a decision." R. at 1095. Juror Lee's earlier statements regarding her personal aversion to imposing a death sentence are irrelevant—the State cannot take a juror's conscientious objections to the death penalty and hold them up as proof against her clear statements that she could follow the law. If the State wanted to establish that Juror Lee was not qualified to sit under the broad Louisiana sentencing scheme, counsel could have questioned her to see if she would renege on her answer that she could set aside her personal beliefs and consider a death sentence. Instead, the State asked Juror Lee if she could "render a death verdict . . . ." *Id.* Juror Lee responded not only by answering the State's question in the affirmative, but also by giving an example of a situation where she would impose death—where the defendant "had no conscious [sic] about killing

nobody"—that was applicable to the facts of this case. *Id. Cf. Uttecht*, 127 S. Ct. at 2226 (finding that juror Z had "an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case"). Neither the State nor the defense asked subsequent questions of Juror Lee.

B. The State Does Not Contest That The Court Denied A Defense Challenge for Cause to A Juror Who Would Assign A Higher Burden of Proof for Mitigating Evidence Than Permitted by Law.

The State's Opposition Brief does not contest that Juror Payne would require mitigating evidence to be proved beyond a reasonable doubt before he would consider it. Louisiana law does not permit the imposition of this onerous burden on the defense: "The [Louisiana] capital sentencing procedure does not establish any presumptions or burdens of proof with respect to mitigating circumstances." *State v. Sonnier*, 402 So. 2d 650, 657 (La. 1981). As Chief Justice Calogero underscored in dissent,

> Because the legislature did not provide any presumptions or fixed standards for a capital sentencing jury to use in considering aggravating and mitigating circumstances, that body intended that a qualified juror not enter the penalty phase of trial with a presumption that death is the appropriate penalty, a presumption

> the defendant would necessarily bear the burden of overcoming.

State v. Campbell (Calogero, C.J., dissenting), Pet. App. C at 157a-158a.

The State acknowledges Juror Payne's Maginot Line that, "if you [the defense] use mitigating circumstances with me, you're going to have to prove them beyond a really reasonable doubt." Cert. Opp. at 14. In direct opposition to Juror Lee who could have considered a sentence of death under the facts of this case, Juror Payne indicated that one of the factors that the defense would have to prove to him "beyond a really reasonable doubt" is petitioner's "mental illness"—an especially important issue in this case. *Id.* Juror Payne's last words on the subject, after he had been thoroughly informed of what the state scheme requires of capital jurors, were that he would "absolutely" require proof beyond a reasonable doubt before he would "give [a defendant] life instead of death." R. 1173-1174.

Similarly, the State does not dispute that "some" of the enumerated statutory mitigating factors would have "no bearing" with Juror Payne. Cert. Opp. at 12. Lack of a significant criminal history, a factor that applies favorably to the petitioner, was one example of an enumerated mitigator that "may or may not have any significance" for Juror Payne. Cert Opp. at 13.

Rather than disputing Juror Payne's clear admission that he could not follow the applicable framework, the State urges that his *voir dire* "as a whole" demonstrates that he would consider both sentencing options. For the reasons asserted in the petition, petitioner vigorously refutes this characterization: the totality of Payne's *voir dire* suggests that he would *not* consider a sentence of life. Additionally, even if Juror Payne could have considered a sentence of life in a global sense, he still would have imposed a higher burden on the defense than the one imposed by the legal framework and he would fail to consider some of the statutory mitigating factors.

A consistent application of the "substantial impairment test" could not permit Juror Payne to sit on the jury while excluding Juror Lee.

II. The State's Opposition Brief Does Not Dispute that the Standard for Determining Partiality Should Be Assessed Consistent with the Historical Underpinnings of the Sixth Amendment

The State's Opposition Brief does not contest Petitioner's assertion that the validity of challenges for cause should be viewed through the historical lens. However the State argues death-qualification is now appropriate because at the time of Blackstone's writings "the death penalty was mandatory, not only for murder and treason but also for 150 other offenses." Cert. Opp. at 18. This fact cuts against the State's position rather than for it. Contrary to the

assertion that "a juror's opinion regarding the imposition of sentence would [] have been irrelevant" at the time of the adoption of the Sixth Amendment, *Id.* at 19, the potential impact of a conscientious objector was at its apex under the English scheme. Because there was no separate sentencing proceeding in Blackstone's England, or at the time of the founding, a juror's opposition to the death penalty could result in a lesser verdict (or an outright acquittal).[2] This historical fact is explored in the conditionally filed *Amicus Brief of Academics*, which details the erosion of the Sixth Amendment guarantee to an impartial jury that has occurred through *Witherspoon* and *Witt*.

Second, the State's response seeks to convert the Fourteenth Amendment's prohibition on discrimination based upon "freehold status, landownership, gender and race," Cert. Opp. at 19, into an exemption from the impartiality prong of the Sixth Amendment. *See id.* at 20 ("Adopting Blackstone's juror qualification system, as petitioner seems to urge, would prohibit consideration of jurors who are otherwise qualified to serve, contrary to egalitarian principles."). At issue is the government's authority to exclude jurors beyond the scope of the law at the time of the founding. The Civil War

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[2] *See* THOMAS GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 28-64 (1985). Louisiana law provides as a valid ground for the state to challenge a juror for cause that "his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt." La. C. Cr. P. Art. 798 (2)(C)

Amendments provided additional limitations on the states' ability to exclude jurors, removing, for instance, the 'defect of birth' identified as a proper challenge to the polls. *See* Blackstone, Book III, Ch. 23, 2. The Civil War Amendments did not transform the shield provided by the Sixth Amendment's guarantee of an impartial jury into a sword permitting exclusion of those jurors who disagree with the state; the Amendments provided an additional limitation on the state's power to exclude citizens from jury service.

Finally, on the merits, the State's opposition brief claims that Justice Samuel Chase's statements in *U.S. v. Callender*, 25 F. Cas. 239 (C.C.Va. 1800), rebut petitioner's "thinly veiled assertion" of the right to invoke jury nullification. Cert. Opp. at 21. Justice Chase provides at best a contested[3] source for our historical understanding.[4] As Professor Berger put it, "for the original understanding we should look to the

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[3] *See* Stephen B. Presser, *Et tu, Raoul? Or The Original Misunderstanding Misunderstood*, 1991 BYU L. Rev. 1475 (1991), in reply to Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 B.Y.U. L. REV. 873, in response to Stephen B. Presser, *The Original Misunderstanding: The English, the Americans and the Dialectic of Federal Constitutional Jurisprudence*, 84 NW. U.L. REV. 106 (1989).

[4] Professor Berger suggests "Chase is a frail foundation on which to erect a jurisprudential structure." *See* Berger, *supra* note 3, at 876.

views expressed by the Framers rather than those of Chase twelve or fifteen years later."[5]

Professor Amar observed that in the aftermath of the debate between Justice Chase and Callender's attorney William Wirt, "Chase was later impeached for his overall handling of Callender, . . . while Wirt, by contrast, went on to become 'one of the greatest Supreme Court advocates of all time . . ..'" Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1191 (1991).

Amar suggests that Justice Chase's argument that "the jury's lack of 'competence' to decide the Sedition Act's (un)constitutionality" does not hold its historical water:

> [W]e have lost the powerful and prevailing sense of 200 years ago that the Constitution was the people's law. Even if juries generally lacked competence to adjudicate intricate and technical "lawyer's law," the Constitution was not supposed to be a prolix code. It had been made, and could be unmade at will, by We the People of the United States—Citizens acting in special single-issue assemblies (ratifying conventions), asked to listen, deliberate, and then vote up or down. . . . Is there not an important truth in Jefferson's exuberant 1789

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[5] *See* Berger, *supra* note 3, at 875 ("[M]y studies constrain me to reject the view that Chase's opinions 'can lay a claim to being inherent in the 1787 document.'" (internal citations omitted)).

> definition of jury trials as "trials by the people themselves"?

Id. at 1195. Despite these criticisms, the *Callender* decision provides a lens with which to discuss the current rule permitting juror disqualification.[6] In *Callender*, Justice Chase oversaw prosecution under the Sedition Act. Ch. 74, 1 Stat. 596, 2 (1798). Justice Chase's management of Callender's prosecution under the Sedition Act is a prime example of the judiciary's encroachment on the jury's authority.

As Blackstone cautioned, the jury trial right was eroded by "not only . . . open attacks . . . but also [by] secret machinations . . . ."[7] The *Amicus Brief of Academics* identifies *Commonwealth v. Lesher*, 17 Serg. & Rawle 155, 159 (Pa. 1828)—one of the earliest examples of death-qualification—as an incremental infringement on the jury trial right. Justice Gibson, dissenting, decried the "horror of judicial legislation" forewarning that the departure from the strict understanding of the term impartial would lead to a myriad of discretionary decisions concerning whether a juror's "abstract position, which is independent of the circumstances of the prisoner's case but which may affect it consequentially, be a ground of challenge for cause." *Id.* While the State asks this Court to

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[6] Even Judge Chase's handling of challenges for cause in *Callender* does not repudiate the claims made in the *Brief of Petitioner* or the *Brief of Academics*.

[7] *Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone).

permit "great discretion" to the court below, Justice Gibson observed:

> "The discretion of a judge," said one of the greatest constitutional lawyers that ever graced the English bench, "is the law of tyrants: it is always unknown: it is different in different men: it is casual and depends upon constitution, temper, and passion. In the best it is oftentimes caprice--in the worst, it is every vice, folly and passion to which human nature can be liable."

Commonwealth v. Lesher, 17 Serg. & Rawle 155, 164-165 (Pa. 1828) (Gibson. J., dissenting).

Whatever one's views of Justice Chase's actions in *Callender* or Justice Gibson's lament in *Lesher*, certiorari should be granted to discern whether the founding Fathers would have upheld the "trial court's great discretion" to remove jurors willing to swear an oath to issue a just verdict under the application of the facts to the law—whether that be the Sedition Act or Louisiana's capital punishment regime.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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